

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re: : Chapter 11  
: :  
Telogy, LLC, et al., : Case No. 10-10206 (MFW)  
: :  
Debtors. : Jointly Administered  
: :  
: **Objection Deadline: February 16, 2010 at 4:00 p.m. (ET)**  
: **Hearing Date: February 23, 2010 at 12:30 p.m. (ET)**  
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**TELOGY, LLC'S MOTION FOR ORDER APPROVING  
EMPLOYEE INCENTIVE PLAN AND AUTHORIZING THE  
IMPLEMENTATION OF THE EMPLOYEE INCENTIVE PLAN  
AND PAYMENTS THEREUNDER PURSUANT TO  
SECTIONS 105(a), 363(b)(1) AND 503(c)(3) OF THE BANKRUPTCY CODE**

Telogy, LLC ("**Telogy**"), one of the debtors and debtors in possession in the above-captioned cases (collectively, the "**Debtors**" or the "**Company**")<sup>1</sup> hereby moves (the "**Motion**") for entry of an order, pursuant to sections 105(a), 363(b)(1) and 503(c)(3) of title 11 of the United States Code (the "**Bankruptcy Code**"), approving the Telogy, LLC, 2010 Employee Incentive Plan (the "**EIP**"), authorizing the implementation of the EIP and authorizing, but not directing, the payment of amounts due to their officers and other employees under, and subject to, the EIP. In support of the Motion and the relief requested herein, Telogy relies upon and incorporates by reference the Affidavit of Gary B. Phillips (the "**Phillips Affidavit**"), which was filed with the Court on January 24, 2010. In further support of the Motion, Telogy, by and through its undersigned proposed co-counsel, respectfully represents:

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<sup>1</sup> The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors' executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

## JURISDICTION

This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363(b)(1) and 503(c)(3) of the Bankruptcy Code.

## INTRODUCTION

1. On January 24, 2010 (the "**Petition Date**"), Telogy and its affiliated debtor, e-Cycle, LLC, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are continuing in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. By order dated January 26, 2010, these chapter 11 cases have been consolidated for procedural purposes only. As of the date hereof, no official committee of unsecured creditors has been appointed.

3. The Debtors are party to two secured credit agreements: that certain Term Loan and Guaranty Agreement, dated as of July 28, 2006 (the "**Term Loan Agreement**"), among Telogy, e-Cycle, the Lenders party thereto (the "**Term Loan Lenders**"), and The Bank of New York (in its capacity as such and as Administrative Agent under the Revolving Credit Agreement (defined below) the "**Agent**"); and that certain Revolving Credit and Guaranty Agreement, dated as of July 28, 2006, among Telogy, e-Cycle, the Lenders party thereto (the

“**Revolving Lenders**” and, collectively with the Term Loan Lenders, the “**Senior Lenders**”),<sup>2</sup> and the Agent (the “**Revolving Credit Agreement**” and, together with the Term Loan Agreement, the “**Secured Credit Agreements**”). The obligations under the Secured Credit Agreements are secured by substantially all of the Debtors’ assets.

4. Prior to the Petition Date, it became apparent that the Debtors had to reduce their debt load and interest expense.<sup>3</sup> Furthermore, Telogy’s concerns about the potential deterioration of its business and concomitant degradation in value increased while it was experiencing liquidity constraints.<sup>4</sup> As a result, Telogy ultimately determined that the value of its estate would best be maximized and preserved through the sale of its remaining operations. After a lengthy marketing process, Telogy determined that the bid from McGrath Rent Corp. (“**McGrath**” or the “**Potential Purchaser**”) was a viable opportunity and commenced these chapter 11 cases to implement the proposed transaction with McGrath pursuant to section 363 of the Bankruptcy Code, subject to a competitive sale process and the solicitation of higher and/or otherwise better offers (a “**Sale**”).

5. In furtherance of this objective, Telogy negotiated extensively with McGrath on the terms and conditions of an asset purchase agreement (the “**APA**”),<sup>5</sup> which was

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<sup>2</sup> The Senior Lenders include affiliates of DDJ Capital Management, LLC and Davidson Kempner Capital Management LLC, affiliates of which are major shareholders of Telogy.

<sup>3</sup> The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are more fully set forth in the Affidavit of Gary B. Phillips, Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings [Doc. No. 2], which was filed on the Petition Date.

<sup>4</sup> While both Debtors are obligors under the Secured Credit Agreement, e-Cycle LLC sold substantially all of its assets prior to the Petition Date and is no longer an operating entity.

<sup>5</sup> See Motion for Orders: (A)(I) Approving Bid Procedures in Connection with Sale of Substantially All of Its Assets; (II) Scheduling Hearing to Consider Sale of Assets; (III) Approving Form and Manner of Notice Thereof; and (IV) Approving Break-Up Fee and Expense Reimbursement; (B)(I) Authorizing and Approving Sale of Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Granting

executed prior to the Petition Date. The APA contemplates the sale of substantially all of Telogy's assets to the Potential Purchaser, free and clear of all liens, claims, encumbrances and other interests other than those expressly assumed by the Potential Purchaser. The APA also contemplates the execution and implementation of a transition services agreement (the "TSA"), pursuant to which Telogy will provide certain services and licenses to the Potential Purchaser and/or its affiliates for up to 90 days after the closing of the Sale. On the Petition Date, Telogy filed a motion for orders approving bidding procedures in connection with the Sale, and bidding protections for the Potential Purchaser, and approving of the Sale. The hearing to consider approval of the bidding procedures is currently scheduled for February 5, 2010.

6. The consummation of the Sale to McGrath represents the Debtors' best presently available opportunity to maximize value through a sale process, and that goal cannot be accomplished without the continued efforts and dedication of Telogy's employees. Not only does the APA contemplate that certain employees will provide specific transition services to the Potential Purchaser, Telogy does not believe that it will be able to comply with its pre-closing obligations under the APA unless it is able to motivate its employees appropriately to maintain the same intensity and quality of performance postpetition as they provided prepetition, and to remain with Telogy through the sale process. Accordingly, the relief requested herein is an integral component to the consummation of the Sale and the Debtors' overall restructuring approach.

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Related Relief [Doc. No. 14] (the "Sale Motion"). A copy of the APA, in substantially final form but excluding schedules and exhibits, is annexed to the Sale Motion as Exhibit A.

## RELIEF REQUESTED

7. By this Motion, Telogy seeks entry of an order pursuant to sections 105(a), 363(b)(1) and 503(c)(3) of the Bankruptcy Code: (a) approving the EIP as described herein; and (b) authorizing Telogy to implement the EIP and make payments required under the EIP.

## THE EMPLOYEE INCENTIVE PLAN<sup>6</sup>

8. The EIP, a copy of which is annexed hereto as Exhibit A,<sup>7</sup> is designed to maximize recoveries in these cases by providing incentive payments to Telogy's 42 employees, including its officers (the "Employees"), for their continued high performance through closing of the Sale, or such other date as their services are no longer needed. Telogy requires the consistent dedication of the Employees to move expeditiously towards consummation of the Sale — an event that will inure to the benefit of Telogy's estate and creditors. The EIP is the product of significant and arms-length negotiations between Telogy and the Senior Lenders, and has been discussed between, and developed by, such parties over a significant period of time. Furthermore, the board of directors of Telogy (the "Board") unanimously approved the adoption of the EIP on behalf of Telogy on January 21, 2010. Lastly, and perhaps most importantly, the

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<sup>6</sup> The descriptions herein are qualified in their entirety by reference to the EIP. To the extent there is a discrepancy between the terms of the EIP and the descriptions contained herein, the terms of the EIP control. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the EIP.

<sup>7</sup> A schedule detailing the amount of incentive payments that may be made to each Employee under the EIP is being provided confidentially to the United States Trustee for the District of Delaware, counsel to the agent for the Debtors' prepetition secured lenders, and counsel to the Committee of Unsecured Creditors, once appointed.

Potential Purchaser effectively required the adoption and implementation of the EIP in its negotiation of, and entry into, the APA.<sup>8</sup>

9. Pursuant to the EIP, the Employees will be eligible to receive bonuses if certain applicable performance objectives (the “**Applicable Objectives**”) are met. The EIP is targeted to ensure that the Employees remain focused on the quick consummation of a Sale of Telogy’s assets at the highest price and on the best terms available. In furtherance of that goal, certain Employees will also be rewarded under the EIP for assisting in enhancing Telogy’s financial performance in the period prior to consummation of a Sale. Each of these goals ultimately benefits Telogy’s estate and creditors.

***Sale Objective***

10. To ensure that Telogy is able to consummate the Sale to the Potential Purchaser or another successful bidder as a result of the marketing and auction process, each Employee will be eligible to receive a fixed bonus amount under the EIP (the “**Fixed Amount**”) if, among other things, the consummation of a Sale (the “**Closing Date**”) occurs on or before December 31, 2010. Additionally, an Employee will only be eligible to receive the Fixed Amount if such Employee is employed by Telogy, the Potential Purchasers, or their respective affiliates through the later of the Closing Date or such other date as identified by the Board, no later than fifteen (15) business days following the Closing Date, unless the Employee is terminated without Cause (as defined in the EIP) prior to such date, in which case the Employee will remain eligible to receive his or her Fixed Amount. Because of their importance to the

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<sup>8</sup> Section 9.2(h) of the APA provides, in pertinent part, that the obligation of the Potential Purchaser to consummate the Sale is dependent on the EIP being in full force and effect (without amendment or modification) as of the closing with respect to certain Employees identified on Schedule 9.2(h) of the APA (the “**Designated Employees**”).

anticipated transition of operations to the Potential Purchaser, the Designated Employees are required to fulfill certain other requirements in order to receive the relevant Fixed Amount. Specifically, if requested, each Designated Employee must (a) enter into a written agreement to maintain the confidentiality of certain information gained during his or her employ with Telogy, (b) at Telogy's request, enter into a transition services, consulting, employment or similar agreement with the Potential Purchaser or one of its affiliates to assist Telogy in the satisfaction of its obligations under the TSA, and (c) complete his or her term of service under such agreement (collectively, the "**Designated Employee Requirements**").<sup>9</sup>

11. Importantly, the Fixed Amounts proposed to be paid under the EIP are modest in comparison to the consideration that will be gained through consummation of the Sale. The EIP provides for Fixed Amounts, in the aggregate, of approximately \$415,000 for all Employees other than the top four officers – an average Fixed Amount of approximately \$11,000 per such Employee. If all Employees, including officers, meet the Applicable Objectives, Telogy proposes to award approximately \$1.16 million in the aggregate in Fixed Amounts. Telogy believes that the proposed awards are reasonable as the Fixed Amounts will not be paid unless the Applicable Objectives and Designated Employee Requirements are met, and such objectives and requirements are designed to ensure that Telogy will have the human capital necessary to perform under the APA and TSA.

### ***Individual Performance Objectives***

12. Certain Employees are Salespersons or Sales Managers (each, as defined in the EIP), and each such Employee may also earn an additional bonus based on his or her

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<sup>9</sup> Designated Employees will also remain eligible to receive bonuses under the EIP if they are terminated without Cause (as defined in the EIP) prior to the end of their required service period.

individual performance. The EIP provides that Salespersons will be rewarded based on a multiple of their rental commissions earned under Telogy's existing policies prior to the Closing Date (the "**Salesperson Variable Amount**"). The EIP also provides that Sales Managers will be rewarded based upon a percentage of their rental bonus amounts earned under Telogy's existing policies prior to the Closing Date (the "**Sales Manager Variable Amount**"). Accordingly, the exact Salesperson Variable Amount or Sales Manager Variable Amount payable to each eligible Employee will depend on such Employee's individual performance and, if such Employee is also a Designated Employee, such Employee's fulfillment of the Designated Employee Requirements. Telogy anticipates that the maximum amount of Salesperson Variable Amounts that will be earned and paid is in the range of approximately \$6,000 to \$9,000 per Salesperson. Additionally, Telogy estimates that the maximum aggregate amount of Sales Manager Variable Amounts that will be earned and paid is in the range of approximately \$5,000 to \$14,000 per Sales Manager. Such amounts paid under the EIP are in addition to the Fixed Amount that may be earned by such Employees, and bonuses and commissions that may be earned under Telogy's existing policies.

13. Notably, the APA provides for an adjustment in the cash consideration to be provided by the Potential Purchaser based on certain metrics (including, without limitation, accounts receivables and equipment rental sales). See APA, § 3.4. Accordingly, it is imperative that the Salespersons and Sales Managers continue to devote significant efforts to maintaining (and hopefully, increasing) Telogy's level of equipment rental. Indeed, given certain parties' reluctance to do business with a debtor, such Employees may have to work even harder to maintain existing customer relationships and secure new business arrangements. Failure to incentivize such Employees appropriately could lead to decreased rentals during the period prior

to the Closing, which could have negative economic repercussions to Telogy and its estate under the APA.

### **BASIS FOR RELIEF REQUESTED**

14. The Employees are being asked to take on considerable additional responsibilities, yet as a result of the chapter 11 filing, such employees cannot be awarded bonuses to compensate them for their enhanced responsibilities that are consistent with past practice. Additionally, due to Telogy's cost-cutting initiatives, certain aspects of the Employees' compensation, such as 401(k) matching, have been eliminated. Additionally, the Senior Lenders have not consented to Telogy's use of cash collateral to pay Employees' accrued but unused vacation time upon separation or severance amounts, so the Employees may be faced with significant losses of expected compensation. While Telogy will continue its prepetition ordinary course commission and bonus commitments,<sup>10</sup> Telogy believes the amounts to be earned under such programs are not significant enough to inspire the level of commitment that will be required to consummate the Sale.<sup>11</sup>

15. Quite simply, the Employees are working more for less and they are being asked to work toward satisfaction of closing conditions on a transaction that, in many cases, will lead to the elimination of their jobs. Under these circumstances, Telogy (and the Potential Purchaser and the Senior Lenders) is very concerned about ensuring that Employees remain

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<sup>10</sup> The Court approved the Debtors' Motion for an Order (i) Authorizing the Debtors to (a) Pay Prepetition Employee Wages, Salaries and Other Compensation, Prepetition Employee Business Expenses, and Other Miscellaneous Employee Expenses and Employee Benefits; and (b) Continue Certain Employee Benefit Plans, Programs and Policies in Effect as of the Petition Date; and (ii) Granting Related Relief on January 26, 2010 [Docket No. 32].

<sup>11</sup> The EIP does not expressly supersede the change of control agreements to which certain executive Employees are a party. However, given the limitations imposed by the Bankruptcy Code on the payment of certain compensation and severance to insiders, the entitlements under the agreements may have limited value (whether as an incentive or otherwise) for such Employees.

appropriately incentivized to help Telogy meet its obligations under the APA. By this Motion, Telogy seeks the authority to provide incentives to those individuals tasked with navigating Telogy through this challenging period.

16. The Employees continue to work against the backdrop of uncertainty of their continued employment, without assumed employment or severance agreements, and no authorization by the Senior Lenders for Telogy to pay accrued but unused vacation pay at separation<sup>12</sup> or severance payments that Telogy routinely made prepetition. The EIP is designed to ensure that Employees are rewarded for their continued service to Telogy, as their continued service assists Telogy in fulfilling its obligations under the APA and the TSA. Without the motivation of monetary reward, and in the face of an imminent sale of Telogy's operations, Employees could leave the company and seek alternative employment. The efforts of the Employees have been and will continue to be instrumental in achieving maximum value for Telogy's stakeholders through consummation of the Sale. Thus, the EIP further assists in aligning the interests of Telogy, its Employees, and its creditors, and in satisfying the terms of the APA and the TSA.

**I. The EIP Should Be Approved Pursuant to Sections 105(a), 363(b)(1) and 503(c)(3) of the Bankruptcy Code.**

***Section 363(b) of the Bankruptcy Code***

17. Section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). In addition, section 363(b)(1) of the Bankruptcy Code permits a debtor in possession to use property of the estate “other than in the ordinary course of business”

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<sup>12</sup> The estimated aggregate amount of accrued but unused vacation pay at separation is approximately \$200,000.

after notice and a hearing 11 U.S.C. § 363(b)(1). Uses of estate property outside the ordinary course of business may be authorized if the debtor demonstrates a “sound business purpose” for it. See, e.g., In re Martin, 91 F.3d 389, 395 (3d Cir. 1996) (“[U]nder normal circumstances the [bankruptcy] court would defer to the trustee’s [or debtor-in-possession’s] judgment so long as there is a legitimate business justification.”); Computer Sales Int’l, Inc. v. Fed. Mogul Global (In re Fed. Mogul Global, Inc.), 293 B.R. 124, 126 (D. Del. 2003) (“[I]n the Third Circuit, a court should approve a debtor’s use of assets outside the ordinary course of business if the debtor can demonstrate a sound business justification for the proposed transaction.”); The Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999) approving a key employee retention program on the basis that debtors showed a “sound business purpose” justifying such approval).

18. Once the debtor articulates a valid business justification for a particular form of relief, the Court reviews the debtor’s request under the “business judgment rule.” The business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

19. The business judgment rule has vitality in chapter 11 cases and shields a debtor’s management from judicial second-guessing. See id.; see also Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee’s judgment concerning use of property under Bankruptcy Code section 363(b) when there is a legitimate business justification); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention

program, stating that “in determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions.”). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

20. The implementation of the EIP is a proper exercise of Telogy’s business judgment and is in the best interests of Telogy, its estate, and its creditors. Telogy has structured the EIP carefully to balance Telogy’s need to incentivize its Employees and to provide them with appropriate, market-competitive compensation with the need to ensure that Telogy’s estate receive enhanced value in exchange for incentive payments — the result that would be most beneficial for Telogy’s creditors. Also importantly, any reductions in the Debtors’ cash collateral based on fulfillment of their obligations under the EIP will only impact the Debtors’ secured Lenders, who have already consented to the EIP.

***The EIP Also Should Be Evaluated under Section 503(c)(3) of the Bankruptcy Code, Using the Same Standard as Section 363(b).***

21. Section 503(c) of the Bankruptcy Code provides criteria for courts to use in approving certain types of payments to insiders and “other transfers or obligations that are outside the ordinary course of business.” Section 503(c) of the Bankruptcy Code comprises three subsections: (1) a general prohibition against retention plans for insiders; (2) limitations on severance payments; and (3) standards governing other transfers to certain employees and consultants, among others, that are outside of the ordinary course of business. For the reasons set forth herein, neither section 503(c)(1) nor section 503(c)(2) of the Bankruptcy Code is applicable to evaluating the EIP.

22. By the statute's plain language, section 503(c)(1) of the Bankruptcy Code pertains solely to retention plans for insiders, and section 503(c)(2) of the Bankruptcy Code addresses only the requirements for severance plans, and neither provision applies to performance-based incentive plans. See, e.g., In re Global Homes Prods., LLC, 369 B.R. 778, 787 (Bankr. D. Del. 2007) (holding that section 503(c) "was not intended to foreclose a chapter 11 debtor from reasonably compensating employees, including 'insiders,' for their contribution to the debtors' reorganization," and that plans that have an ancillary retentive effect are not retention plans subject to section 503(c)(1)) (emphasis omitted); In re Nellson Nutraceutical, Inc., 369 B.R. 787, 802 (Bankr. D. Del. 2007) (finding that section 503(c)(1) applies only to retention programs with "the *primary* purpose of inducing [an employee] to remain with the debtor's business.") (emphasis in original); In re Nobex Corp., Case No. 05-20050, January 12, 2006, Hearing Tr. at 67 (MFW) (Bankr. D. Del. 2006). Indeed, one court held that:

If sections 503(c)(1) and (c)(2) are not operative, a court may consider whether the payments are permissible under section 503(c)(3), which limits payments made to management and employees, among others, outside the ordinary course, unless such payments are shown to be justified under the facts and circumstances of chapter 11 case. As one treatise points out, the test appears to be no more stringent a test than the one courts must apply in approving any administrative expense under 503(b)(1)(A).

In re Dana Corporation, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006).

23. The EIP is intended to provide neither bonuses for retention, nor severance pay for any of the Employees. Although a small number of the Employees may be deemed "insiders"<sup>13</sup> within the meaning of the Bankruptcy Code, the EIP has been crafted with great

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<sup>13</sup> Only four Employees may constitute "insiders" under section 101(31) of the Bankruptcy Code: Mr. Gary Phillips (Chief Executive Officer), Mr. Mark Brandt (Chief Financial Officer), Mr. Steven Pease (Chief Operating Officer) and Mr. Stephen Jacobson (Senior Vice President of Finance).

care, and in consultation with the Senior Lenders, to ensure that it directly incentivizes all Employees to meet the Applicable Objectives. In particular, the EIP is comprised of only targeted incentive payments to management and other employees who play critical roles in Telogy's operations. These incentive payments are based upon the successful achievement of certain goals relating to the sale of substantially all of Telogy's assets, the efficient management of the bankruptcy cases and the expedited completion of these cases. Consequently, the EIP is properly characterized as a performance based management incentive plan, not a retention plan for insiders subject to the requirements of section 503(c)(1) of the Bankruptcy Code.

24. Although the EIP will have the added benefit of curbing potential attrition among Employees, that is merely a byproduct of the EIP. This does not make the EIP a "retention" plan, nor does it detract from the primary purpose of the plan, which is to provide incentives to participants to help Telogy maximize the value of its estate. The EIP is not in place merely to retain the Employees, but to motivate them. Preparation for these cases has required tremendous effort from the Employees yielding actual benefits to these estates. Although they have already achieved measurable success, the dedication of the Employees remains critical for the consummation of a Sale in a fashion that brings the maximum benefit to Telogy's estate and creditors. Telogy submits that the EIP is a critical motivational tool, which is necessary to compel the Employees to continue to put in the many additional hours needed to lead Telogy to the closing of a Sale. Accordingly, the EIP exists to reward the Employees for the extraordinary efforts that will be needed to consummate the Sale, and any reduction in cash collateral based on Telogy's fulfillment of obligations under the EIP is fully consented to by the Debtors' secured Lenders.

25. Finally, the EIP does not constitute severance for insiders subject to the provisions of section 503(c)(2) of the Bankruptcy Code, because it does not provide benefits to Employees solely upon termination of their employment with Telogy. See 11 U.S.C. § 503(c)(2). Therefore, the EIP is a management incentive plan, not a severance plan for insiders subject to the requirements of section 503(c)(2) of the Bankruptcy Code.

26. To the extent that distributions under the EIP are payments “outside the ordinary course of business,” they should be evaluated under section 503(c)(3). See, e.g., In re Nellson Neutraceutical, Inc., 369 B.R. 787 (Bankr. D. Del. 2007) (debtor continuing to provide incentive bonuses under management incentive plan did not violate section 503(c) of the Bankruptcy Code); Dana, 358 B.R. at 581.

27. Section 503(c)(3) of the Bankruptcy Code states, in relevant part, that “there shall be neither allowed nor paid . . . other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case. . . .” Courts analyzing various payments under section 503(c)(3) of the Bankruptcy Code have consistently held that they must use the “business judgment” standard as the proper standard for determining whether incentive programs and the payments thereunder are justified. See In re Nobex Corp., Case No. 05-20050, January 12, 2006, Hearing Tr. at 86-87 (an order approving the management incentive plan at issue was entered January 20, 2006). See also Dana, 358 B.R. at 576 (Judge Lifland agreeing that management incentive programs should be evaluated under the business judgment standard).

***The EIP Has a Sound Business Purpose, and Should Be Authorized by this Court Pursuant to Sections 363(b)(1) and 503(c)(3) of the Bankruptcy Code.***

28. The EIP satisfies the business judgment standard of section 363(b)(1) and 503(c)(3) of the Bankruptcy Code, in that it is: (a) precisely calibrated to achieve the desired performance; (b) fair and reasonable in scope; and (c) does not discriminate unfairly.

29. First, the EIP will reward participants for their postpetition efforts, which are expected to be significant, and their increased responsibilities and burdens over the upcoming months as a result of these chapter 11 cases. The Applicable Objectives set forth in the EIP depend upon the consummation of a Sale and continued financial achievement of the sales force. Also, the Applicable Objectives encourage the Employees to assist Telogy in fulfilling its obligations under the APA and TSA. Thus, implementation of the EIP will align the motivations of Employees with the motivations of Telogy and its creditors and the Debtors' Lenders and, as such, is integral to Telogy's satisfaction of its obligations under the APA.

30. Second, Telogy's ability to preserve and maximize the value of its assets would be substantially hindered if Telogy were unable to properly incentivize its Employees, many of whom have already had to sacrifice components of their compensation as a result of Telogy's circumstances. Authorization to implement the EIP will provide the Employees with a greater sense of financial security thereby minimizing the need to seek other employment which would otherwise distract the Employees from the necessary tasks they need to perform for Telogy and in connection with the Sale. Providing incentives to encourage the Employees to focus on Telogy's objectives, and to motivate them to provide optimal levels of performance, is necessary to successfully maintain Telogy's business and thus, maximize its value.

31. Third, the overall cost of the EIP is reasonable, particularly compared to the size of these estates.

32. Finally, targeted incentive programs have repeatedly been recognized by this and other courts, as having particular value in motivating management teams. See, e.g., In re Global Home Products, 369 B.R. at 787; In re BSCV, Inc. (f/k/a Boscov's, Inc.), No. 08-11637 (KG) (Bankr. D. Del. Sept. 5, 2008); In re Dana Corp., Case No. 06-10354 (BRL) (Bankr. S.D.N.Y. Dec. 18, 2006); In re Musicland Holding Corp., Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Aug. 11, 2006); In re Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. May 15, 2006); In re Refco Finance Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Jan. 17, 2006).

33. Telogy strongly and reasonably believes that the EIP is critical to its ability to maximize returns to creditors. The payments are structured to focus the Employees on the execution of their duties efficiently and expeditiously. Simply stated, the EIP is necessary and appropriate because it rewards the Employees for maximizing and preserving the value of the estate for the benefit of Telogy's creditors under very difficult circumstances. Moreover, the Senior Lenders have consented to the implementation of the EIP and the payments provided thereunder.

34. Based on the foregoing, the implementation of the EIP is an appropriate exercise of Telogy's business judgment; is necessary and in the best interest of Telogy, its creditors, and its estate; and should be approved under sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code.

#### **NOTICE**

35. Notice of this Motion will be given to: (a) the United States Trustee for the District of Delaware; (b) counsel to the agent for the Senior Lenders; (c) counsel to the Official Committee of Unsecured Creditors once appointed; (d) Telogy's twenty (20) largest unsecured creditors; and (e) those parties that have requested notice pursuant to Bankruptcy Rule 2002 as of

the date hereof. Telogy submits that, under the circumstances, no other or further notice is required.

36. No previous application for the relief sought herein has been made to this or any other court.

**CONCLUSION**

WHEREFORE, Telogy respectfully requests that the Court enter an order, substantially in the form annexed hereto as Exhibit B, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: Wilmington, Delaware  
February 1, 2010

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*Proposed Co-Counsel to the Debtors  
and Debtors-in-Possession*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re: : Chapter 11  
Telogy, LLC, et al., :  
 : Case No. 10-10206 (MFW)  
 :  
 : Joint Administration Pending  
Debtors.<sup>1</sup> :  
 : **Objection Deadline: February 16, 2010 at 4:00 p.m. (ET)**  
 : **Hearing Date: February 23, 2010 at 12:30 p.m. (ET)**  
----- X

**NOTICE OF MOTION**

TO: (A) THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (B) COUNSEL TO THE AGENT FOR THE DEBTORS' PREPETITION SECURED LENDERS; (C) THE DEBTORS' TWENTY (20) LARGEST UNSECURED CREDITORS ON A CONSOLIDATED BASIS; AND (D) THOSE PARTIES REQUESTING NOTICE PURSUANT TO BANKRUPTCY RULE 2002

PLEASE TAKE NOTICE that the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors") have filed the attached **MOTION FOR ORDER APPROVING EMPLOYEE INCENTIVE PLAN AND AUTHORIZING THE IMPLEMENTATION OF THE EMPLOYEE INCENTIVE PLAN AND PAYMENTS THEREUNDER PURSUANT TO SECTIONS 105(a), 363(b)(1) AND 503(c)(3) OF THE BANKRUPTCY CODE** (the "Motion"), with the United States Bankruptcy Court for the District of Delaware.

PLEASE TAKE FURTHER NOTICE that responses, if any, to the Motion are required to be filed on or before **February 16, 2010 at 4:00 p.m. (ET)** (the "Objection Deadline") with the United States Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must also serve a copy of the response upon the Debtors' undersigned counsel so as to be received on or before the Objection Deadline.

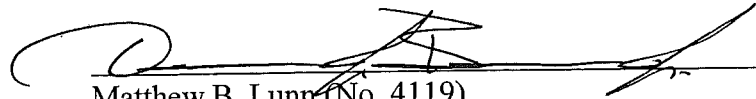
PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE SALE MOTION, SOLELY AS IT RELATES TO THE BIDDING PROCEDURES ORDER, INCLUDING THE BREAK-UP FEE AND EXPENSE REIMBURSEMENT WILL BE HELD ON **FEBRUARY 23, 2010 AT 12:30 P.M. (ET)**, BEFORE THE HONORABLE MARY F. WALRATH, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5<sup>TH</sup> FLOOR, COURTROOM NO. 4, WILMINGTON, DELAWARE 19801.

<sup>1</sup> The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors' executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED BY THE SALE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: Wilmington, Delaware  
February 1, 2010

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Matthew B. Lunn (No. 4119)  
Donald J. Bowman, Jr. (No. 4383)  
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1000 West Street, 17<sup>th</sup> Floor  
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-and-

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John C. Longmire  
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Andrew D. Sorkin  
787 Seventh Avenue  
New York, New York 10019  
(212) 728-8000

Proposed Counsel to the Debtors  
and Debtors in Possession

**EXHIBIT A**

**Employee Incentive Program**

**TELOGY, LLC**  
**2010 EMPLOYEE INCENTIVE PLAN**

**SECTION 1. Purpose.**

The Plan is intended to incentivize certain of the Company's employees to maximize the value of the Company in connection with a Sale. The Plan shall become effective upon the Effective Date.

**SECTION 2. Definitions.**

2.1. "Administrator" means the Board of Directors of the Company.

2.2. "Applicable Objective(s)" means, with respect to each Participant, all of the following, as applicable:

- (a) the consummation of a Sale on or prior to December 31, 2010;
- (b) either (i) the Participant's continuous employment with the Company, the Buyer, or their respective affiliates through the later of the Closing Date or such other date as identified, no later than fifteen (15) business days following the Closing Date, in writing by the Administrator, or (ii) a termination of the Participant's employment by the Company, the Buyer, and their respective affiliates without Cause prior to the date designated in clause (i) above;
- (c) with respect to each Designated Employee, (i) if required pursuant to the terms of the Asset Purchase Agreement, the execution and delivery of a proprietary information agreement in the form reasonably requested by the Buyer, and (ii) at the Company's request, on or prior to the date that is ninety (90) days following the Closing Date, such Participant's (A) execution and delivery of a commercially reasonable transition services, consulting, employment or similar agreement with the Buyer or one of its affiliates to assist the Company in the satisfaction of its obligations under the Transition Services Agreement, and (B) completion of his or her required term of service under such agreement (which shall not exceed ninety (90) days); provided, that if such Participant is terminated without Cause prior to the completion of such term of service, such Participant shall remain entitled to receive his or her Bonus Amount on the applicable Payment Date.

2.3. "Applicable Quarter" means each Fiscal Quarter commencing with the first Fiscal Quarter of 2010 and ending with the Fiscal Quarter during which the Closing Date occurs.

2.4. “Asset Purchase Agreement” means that certain Asset Purchase Agreement dated as of January 22, 2010 between the Company and McGrath RentCorp, a California corporation.

2.5. “Bonus Amount” means, for each Participant, the Fixed Amount *plus*, (i) for each Salesperson, the Salesperson Variable Amount, and (ii) for each Sales Manager, the Sales Manager Variable Amount.

2.6. “Buyer” means the purchaser of all or substantially all of the Company’s assets in connection with a Sale.

2.7. “Cause” means, (i) a Participant’s conviction of or indictment for any crime (whether or not involving the Company) (A) constituting a felony or (B) that has, or could reasonably be expected to result in, an adverse impact on the performance of Participant’s duties to the Company, or otherwise has, or could reasonably be expected to result in, an adverse impact to the business or reputation of the Company; (ii) the gross negligence or willful misconduct of the Participant, in connection with his or her employment, that has, or could reasonably be expected to result in, material injury to the business or reputation of any member of the Company; or (iii) the Participant’s failure or refusal to adequately perform the Participant’s duties to the Company, in each case as determined by the Administrator.

2.8. “Code” shall mean the Internal Revenue Code of 1986, as amended from time to time, and the rules and regulations promulgated thereunder.

2.9. “Closing Date” means the date on which a Sale is consummated.

2.10. “Company” means Telogy, LLC, a Delaware limited liability corporation.

2.11. “Designated Employee” means a Participant designated as a Designated Employee on Exhibit A, attached hereto.

2.12. “Effective Date” means January 21, 2010.

2.13. “Eligible Employee” means each employee of the Company.

2.14. “Fiscal Quarter” means one of four three (3) month intervals on the Company’s financial calendar that together comprises the Fiscal Year.

2.15. “Fiscal Year” means the period from January 1 to December 31 of each calendar year.

2.16. “Fixed Amount” means, with respect to each Participant, the amount payable to such Participant upon achievement of the Applicable Objective(s), as set forth on Exhibit A attached hereto, and such Participant’s Participation Notice.

2.17. “Participant” means each Eligible Employee who has received a Participation Notice from the Administrator.

2.18. "Participation Notice" shall mean a notice evidencing a Participant's participation in this Plan and such Participant's Fixed Amount, substantially in the form attached hereto as Exhibit B.

2.19. "Payment Date" shall mean, with respect to a Participant, the Company's first regular payroll date following the date on which such Participant's Applicable Objective(s) are achieved; provided, that in no event will a Payment Date occur after March 15, 2011.

2.20. "Plan" means this Telogy, LLC 2010 Employee Incentive Plan.

2.21. "Sale" means, on or prior to December 31, 2010, the consummation of a sale of all or substantially all of the Company's assets pursuant to the terms, and subject to the conditions, set forth in (i) the Asset Purchase Agreement, or (ii) such other purchase agreement that the Administrator has determined would provide a greater economic benefit to the Company than the Asset Purchase Agreement.

2.22. "Salesperson" means a Participant designated as a Salesperson on Exhibit A, attached hereto.

2.23. "Sales Manager" means a Participant designated as a Sales Manager on Exhibit A, attached hereto.

2.24. "Salesperson Variable Amount" means, with respect to each Salesperson, an amount equal to two (2) times the normal rental commissions earned by the Salesperson during the period commencing on the Effective Date and ending on the Closing Date.

2.25. "Sales Manager Variable Amount" means, with respect to each Sales Manager, an amount equal to (i) fifty percent (50%) of the normal rental bonus earned by the Sales Manager for each Applicable Quarter ending on or prior to the Closing Date, *plus* (ii) if the Closing Date occurs prior to the end of an Applicable Quarter, fifty percent (50%) of a pro rata portion of such Sales Manager's normal rental bonus for such Applicable Quarter, with the pro rata portion being calculated based on the number of days that have elapsed in such Applicable Quarter prior to the Closing Date.

2.26. "Transition Services Agreement" has the meaning set forth in the Asset Purchase Agreement.

### **SECTION 3. Administration.**

The Plan shall be administered by the Administrator, which shall have the sole authority to (i) construe, interpret, and implement the Plan, (ii) prescribe, amend, and rescind rules and regulations relating to the Plan, and (iii) make all other determinations deemed necessary or advisable for the administration of the Plan. The determination of the Administrator on all matters relating to the Plan or any amounts payable hereunder shall be final, binding, and conclusive. The Administrator may delegate to officers or employees of the Company, the authority, subject to such terms as the Administrator shall determine, to perform such functions, including but not limited to administrative functions, as the Administrator may

determine appropriate. The Administrator may appoint agents to assist it in administering the Plan.

#### **SECTION 4. Payment of Bonus Amounts.**

4.1. In the event that the Participant satisfies the Applicable Objective(s), he or she shall be entitled to receive a lump sum cash payment in an amount equal to the Bonus Amount, payable on the Payment Date.

4.2. For the avoidance of doubt, in the event that a Participant's employment is terminated for any reason (other than by the Company without Cause) prior to the Payment Date, such Participant shall forfeit any and all rights under the Plan, and such Participant shall have no future right to any Bonus Amount. In addition, if any Participant's Applicable Objectives have not been fully satisfied by March 15, 2011, such Participant shall forfeit any and all rights under the Plan, and such Participant shall have no future right to any Bonus Amount.

4.3. The Company shall deduct from all amounts paid to the Participant under the Plan all federal, state, local, and other taxes required by law to be withheld.

#### **SECTION 5. Employment Rights.**

Neither the Plan nor any action taken hereunder shall be construed as giving any employee the right to be retained in the employ or service of the Company. This Plan does not constitute a term or condition of employment and no Participant shall have any right to receive payments hereunder, except to the extent all conditions relating to the receipt of such payments have been satisfied.

#### **SECTION 6. Compliance with Laws.**

The obligations of the Company hereunder shall be subject to all applicable laws, rules, and regulations, and to such approvals by governmental agencies as may be required.

#### **SECTION 7. Termination or Amendment.**

The Administrator may amend or terminate the Plan at any time in its sole discretion.

#### **SECTION 8. Assignment; Successors.**

No Participant under the Plan may assign, transfer or in any other way alienate any benefit to which he or she may be entitled, nor shall any benefit under the Plan be subject to garnishment, attachment, execution or levy of any kind.

#### **SECTION 9. Governing Law.**

The Plan shall be governed by and construed in accordance with the internal laws of the State of Delaware without reference to the principles of conflicts of laws thereof.

**SECTION 10. No Liability of Administrator.**

The Administrator (or its members) shall not be personally liable by reason of any contract or other instrument related to the Plan executed by an individual or on its or their behalf in its or their capacity as the Administrator (or members thereof, if applicable), or for any mistake of judgment made in good faith, and the Company shall indemnify and hold harmless each individual to whom any duty or power relating to the administration or interpretation of the Plan may be allocated or delegated, against any cost or expense (including legal fees) or liability arising out of any act or omission to act in connection with the Plan unless arising out of such person's own fraud or bad faith.

**SECTION 11. Section 409A.**

It is intended that the payments to be made under this Plan comply with Section 409A of the Code and the regulations promulgated thereunder, and the Administrator shall interpret the Plan provisions accordingly. Notwithstanding such, in no event whatsoever shall the Company or any of its affiliates (including the Administrator) be liable for any additional tax, interest, or penalties that may be imposed on any Participant by Section 409A of the Code or any damages for failing to comply with Section 409A of the Code, other than for withholding obligations or other obligations applicable to employers, if any, under Section 409A of the Code.

**SECTION 12. Unfunded Plan.**

12.1. Participants shall have no right, title, or interest whatsoever in or to any investments which the Company may make to aid it in meeting its obligations under the Plan. Notwithstanding anything contained herein to the contrary, to the extent that any person acquires a right to receive payments from the Company under the Plan, such right shall, unless otherwise determined by a court of competent jurisdiction, be no greater than the right of an unsecured general creditor of the Company.

12.2. The Plan is intended to be a "bonus plan" which is not subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). If the Plan is nonetheless determined to be so subject, it is intended to constitute a "plan which is unfunded and is maintained by the employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as such phrase is used in ERISA, and the terms of the Plan shall be interpreted consistent with such intent.

\* \* \*

## EXHIBIT A

### Bonus Amounts

(each Participant with an asterisk (\*) next to his or her name shall be considered a Salesperson for purposes of this Plan)

(each participant with (SM) next to his or her name shall be considered a Sales Manager for purposes of this Plan)

(Fixed Amounts have been redacted for confidentiality reasons)

#### Participants who are Designated Employees

Participant (Last Name, First Name)	Fixed Amount
Pease, Steven	
Jacobson, Stephen	
Beach, Michaelle	
Cook, Claudia	
Johnson, Kevin	
Rader, Allan	
Tompkins, Ocus	
Wilton, Scott	
Phillips, Gary	
Brandt, Mark	
(SM) Cox, Alexander	
*Dionne, John	
*Lustig, Jeff	
*Teahan, Jay	

#### Participants other than Designated Employees

Participant (Last Name, First Name)	Fixed Amount
Wu, Grace Wu	
Vaidheeswaran, Rajan	
Heaton, Timothy	
Bloomberg, Marianne	

Kwok, Charlotte	
Lee, Janey	
Reyes, Joseph	
Tran, Kiet	
Kottai Rajaram, Kalpana	
Neelakandan, Balakrishnan	
Suthar, Vinay	
Peralta, Prudence	
Schiavo, Nicole	
Toralba, Jennifer	
Meyer, Derrick	
*Burnett, Barbara	
*Campbell, Sean	
*Kitching, Norman	
*Willey, Sherrill	
(SM) Goth, Michael	
Chien, Angela	
Francesconi, Richard	
Bibat, Benito	
Glover, Jay	
Peebly, Jason	
Reed, Rick	
Teague, Kenneth	
Villaluna, Michael	

**EXHIBIT B**

**Telogy, LLC  
2010 Employee Incentive Plan**

**Participation Notice**

Participant Name: \_\_\_\_\_

You have been selected to participate in the Telogy, LLC 2010 Employee Incentive Plan (the "Plan") [as a Designated Employee].

Your Fixed Amount (as defined in the Plan) under the Plan is \$[•].

Except as otherwise required by law, your Bonus Amount shall be kept strictly confidential. Failure to maintain such confidence may result in immediate termination of participation in the Plan.

**PLEASE NOTE THAT BECAUSE THE COMPANY IS IN BANKRUPTCY, ACTUAL PAYMENT OF ANY AMOUNTS UNDER THE PLAN IS SUBJECT TO THE APPROVAL OF THE BANKRUPTCY COURT.**

Sincerely,

Telogy, LLC

\_\_\_\_\_  
By:  
Title:

**EXHIBIT B**

**Proposed Order**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

-----X	:	Chapter 11
In re	:	
	:	
Telogy, LLC, <u>et al.</u> ,	:	Case No. 10-10-10206 (MFW)
	:	
Debtors.	:	Jointly Administered
	:	
-----X	:	Ref. Docket No. _____

**ORDER APPROVING EMPLOYEE INCENTIVE PLAN AND  
AUTHORIZING THE IMPLEMENTATION OF THE EMPLOYEE  
INCENTIVE PLAN AND PAYMENTS THEREUNDER PURSUANT TO  
SECTIONS 105(a), 363(b)(1) and 503(c)(3) OF THE BANKRUPTCY CODE**

Upon consideration of the motion (the “**Motion**”) of Telogy, LLC (“**Telogy**”), one of the debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**” or the “**Company**”),<sup>1</sup> for entry of an order, pursuant to sections 105(a), 363(b)(1) and 503(c)(3) of title 11 of the United States Code (the “**Bankruptcy Code**”), approving the Telogy, LLC, 2010 Employee Incentive Plan (the “**EIP**”), authorizing the implementation of the EIP and authorizing, but not directing, the payment of amounts due to their officers and other employees under, and subject to, the EIP; and due and sufficient notice of the Motion having been given; and it appearing that the relief requested by this Motion is in the best interest of Telogy, its estate and creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor, it is hereby

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<sup>1</sup> The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors’ executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is granted to the extent set forth herein.
2. Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.
3. Pursuant to sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code, Telogy is authorized, but not required to: (a) implement the EIP; and (b) make payments pursuant to the EIP; and (c) take such other actions as may be necessary or advisable in furtherance of the foregoing.
4. The authorization granted hereby to make payments to the Employees under the EIP shall not create a binding obligation on the part of the Debtors or their officers, directors, attorneys or agents to implement or make payments under the EIP.
5. Payments made to the Employees pursuant to the EIP shall be treated in the Debtors' chapter 11 cases as allowed administrative expenses in accordance with section 503 of the Bankruptcy Code.
6. Neither this Order nor any payment or performance by Telogy authorized hereunder shall be deemed an assumption of any executory contract or otherwise affect Telogy's rights under section 365 of the Bankruptcy Code to assume or reject any executory contract.
7. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

8. This Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware  
February \_\_\_\_, 2010

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Mary F. Walrath  
United States Bankruptcy Judge